



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

Ms. Eliza Savage
Public Comments Processing
Attn: FWS-R9-MB-2011-0094
Division of Policy, Performance, and Management Programs
U.S. Fish and Wildlife Service, MS: BPHC
5275 Leesburg Pike
Falls Church, VA 22041-3803

Dear Ms. Savage:

In accordance with our responsibilities under Section 309 of the Clean Air Act and the National Environmental Policy Act, the U.S. Environmental Protection Agency (EPA) has reviewed U.S. Fish and Wildlife Service's (Service) Draft Programmatic Environmental Impact Statement (Draft PEIS) for the Eagle Rule Revision.

The Service is proposing to modify current management objectives for bald and golden eagles which were established with the 2009 eagle permit regulations and Final Environmental Assessment (EA) of the regulatory permitting system under the Eagle Protection Act. The Eagle Protection Act (16 U.S.C. 668-668c) prohibits take of bald and golden eagles, except pursuant to federal regulations, and allows the Secretary of the Interior to issue regulations to authorize the "taking" of eagles for various purposes. The Eagle Rule employs strategic management and monitoring and determines permitted eagle take levels consistent with the Eagle Protection Act. Along with the proposed rule, the Service also released a status report, which shows an increase in bald eagle populations in the United States but a possible decline in golden eagle populations. Unauthorized sources of human-caused mortality are a significant factor affecting population trends and size for golden eagles.

The Service's incidental take permit regulations provide an opportunity to ensure compliance with the Eagle Protection Act, and in doing so, secure avoidance, minimization, and compensatory mitigation measures to reduce and offset detrimental impacts to eagles. The draft PEIS analyzes five alternatives, including the no action alternative, to establish management objectives and a permitting framework that will ensure preservation of eagles while decreasing the regulatory burden on the Service and increasing certainty for those engaged in otherwise lawful activities. The preferred alternative (Alternative 5) would use: four administrative flyway Eagle Management Units (EMUs), based on historical migratory routes, for both species; conservative take levels; and a two tier permit scheme (5-year and 30-year for entities that

participate in long-term activities that may incidentally take bald or golden eagles, such as wind energy projects). The Service proposes to conduct 5 year periodic reviews of the 30-year permits to reassess fatality rates, effectiveness of measures to reduce take, the appropriate level of compensatory mitigation, and eagle population status.

Based on our review of the draft PEIS, we offer the following comments:

Take Levels

We recommend that the Final PEIS include further explanation of how the proposed take levels in the preferred alternative meet the Service's new proposed goal of "maintaining increasing populations in all eagle management units and persistence of local populations throughout the geographic range of both species."¹

Additionally, as stated in the Executive Summary, in the *Management Common to All Action Alternatives* section, page iv, "for 50 CFR 22.27 nest take permits, ...The requirement to implement Advanced Conservation Practices (ACPs) to reduce take to the point where any remaining take is unavoidable, which currently applies to programmatic permittees, would be eliminated. Provisions for additional flexibility to issue permits would also be added when there is no *significant biological impact* to eagles." The EPA recommends clarification of "no *significant biological impact* to eagles" in the final PEIS.

30-Year Permits

We recommend that the Final PEIS discuss the differences between a renewable 5-year permit and a 30-year permit with reviews every 5 years. Specifically, the EPA recommends that more detail on the negotiation process be provided, such as clarification of if there will be time constraints or time limits for completion, ground rules for the process, the practicality of additional mitigations, and the required quality of the scientific evidence to be provided.

We also recommend that the final PEIS further explain any differences in public participation and accessibility of information between a 5-year permit and a 30-year permit with 5-year reviews. For example, would the public be given an opportunity to share information to assist in the review process at the 5-year evaluation intervals of the 30-year permits? Will additional NEPA documents be prepared to tier off of this programmatic NEPA document if the 5 year review reveals changes in management action or mitigation?²

Monitoring and Adaptive Management:

In the Summary, p. viii of the Draft PEIS states that "Alternative 5 lends itself most to adaptive management in the face of the increasing anthropogenic environmental disturbances as the 21st century proceeds." Chapter 2, the Alternatives section, on p. 24, states that "Maximum duration of permits would be extended to 30 years. The Service would evaluate each permit at no more

¹ FWS. 2016b. Eagle permits: Revisions to regulations for eagle incidental take and take of eagle nests. 81 Fed. Reg. 27934, 27940, May 6, 2016.

² This NEPA strategy is identified in the DOI Adaptive Management Technical Guide at: <http://nctc.fws.gov/courses/csp/csp3132/resources/USFWS/Technical%20Guide%20to%20Adaptive%20Management.pdf>

than five-year intervals.” It is not clear if the 5-year reviews will use the principles of adaptive management. We recommend that the Final PEIS clarify this point.

The EPA supports the use of adaptive management for decision-making where there is uncertainty as to the level of impact or the ability of a resource to respond to change. Monitoring is a key component of adaptive management.

We recommend the Final PEIS discuss the following elements of an adaptive management plan and whether they would be included in long-term permits:

- Identification of clear monitoring objectives
- The level of impact that will trigger action, including mitigation measures that would be implemented should a threshold be exceeded
- Funding sources for long-term mitigation and monitoring for the life of the permit
- Mechanisms for public disclosure of the monitoring results and adaptive management decisions

Also, the preferred alternative would include a requirement that cumulative effects of permits be analyzed at the Local Area Eagle Population (LAP) scale because the proposed flyway EMU management scale is larger than the current EMUs and less protective of eagle populations at more local scales. However, the Draft PEIS highlights the difficulty in conducting this level of analysis. We recommend that the Final PEIS further explain how analysis at the LAP level will be accomplished in order to ensure populations within the LAPs remain viable, despite the larger management scale.

We note that there are a number of regional and local working groups on golden and bald eagles that can inform monitoring decisions. For example, the California and Nevada Golden Eagle Working Group actively coordinates activities surrounding golden eagle inventory, monitoring, research, and conservation efforts in California and Nevada. We recommend that the Service consider using information generated by these working groups in risk assessment and predictive modeling, monitoring plans, and determination of appropriate mitigation measures. Additionally, the EPA recommends that the Final PEIS include further information in the monitoring plan regarding enforcement capability and effectiveness for addressing unpermitted take, as well as for ensuring compliance with the take permits.

Coordination with State Law

The EPA recommends that the Final PEIS address coordination with State law and discuss any potential conflicts with State law that are possible should State permits also be needed for a project. For example, the State of California is unable to authorize incidental take of species classified as “fully protected”³ when activities are proposed in areas inhabited by those species⁴. We recommend the Final PEIS identify where the bald and golden eagles are listed as threatened or endangered under State law and how the permits will be coordinated with State law.

Compensatory Mitigation

The Draft PEIS states that although the Service considers and is working with partners to test

³ See: https://www.dfg.ca.gov/wildlife/nongame/t_e_spp/fully_pro.html

⁴ See: http://www.dfg.ca.gov/habcon/cesa/other_protects.html

other offsetting compensatory mitigation methods, power line retrofits remain the approach that has the most promise and least risk (p.86). Other mitigation options are mentioned, e.g. lead bullet replacement, removal of carrion from highway, but the text indicates these measures have not been verified as to effectiveness or quantification of offsets that can be achieved.

We recommend that the Final PEIS include a list of acceptable compensatory mitigation measures, the probable effectiveness of the mitigation measures, and uncertainties associated with the compensatory mitigation measure. The EPA also recommends that the Final PEIS's evaluation of mitigation options includes a discussion on how mitigation plans will demonstrate that the proposed mitigation will offset the take, i.e. whether there would be sufficient data to demonstrate mitigation efficacy.

Based on our review of the PEIS, we have rated the proposed action an LO (Lack of Objections). A copy of the EPA's rating criteria is enclosed. If we can provide further explanation of our comments, I can be reached at 202-564-8029, or you can contact Megan Barnhart of my staff at 202-564-5936.

Sincerely,



Shari Wilson
Acting Director
Office of Federal Activities

Enclosure